

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

BUSINESSES FOR A BETTER NEW YORK, et al.

Plaintiffs,

v.

Civil No. 06-CV-0669

LINDA ANGELLO, in her official capacity as
Commissioner of Labor for the State of New York, et.

Defendants.

**MEMORANDUM OF LAW
ON BEHALF OF PLAINTIFFS**

PRELIMINARY STATEMENT

New York's continuing enforcement of Labor Law § 240(1) and § 241(6) (the "Statutes") violates the Equal Protection, Commerce and Supremacy Clauses of the federal Constitution. The Equal Protection Clause violation stems from the disparate treatment of construction businesses which have employees engaged in height-related risks compared to those construction companies that have not. These affected construction companies pay significantly higher premiums for general liability and worker's compensation insurance coverage, bringing their businesses in serious jeopardy. Many construction businesses have failed in recent years; others have struggled barely to survive. While the Statutes were originally enacted for the legitimate purpose of protecting construction workers, New York does not have measurably fewer construction accidents or deaths than its surrounding states; in fact, New York has more. But, New York construction businesses are not the only ones to suffer. The Statutes also apply to non-New York businesses that perform work in New York with height-related risks. This creates an extraterritorial affect, implicating the Commerce Clause. Most importantly, even if

the Statutes in question were otherwise Constitutional, which they are not, they stand in violation of the Supremacy Clause of the federal Constitution, as they have long since been preempted by OSHA.

The Statutes' total inability to help New York achieve its intended purpose of protecting workers shows there is no "rational relationship" between the Statutes and the goal, and thus no justification for treating these construction businesses, which are in the same "class of citizens" for the purposes of the Fourteenth Amendment, differently. Since the Statutes subject both in-state and out-of-state construction businesses with height-related risks to disparate treatment causing financial harm, and because the Statutes have been preempted by OSHA, this Court should ultimately declare that § 240(1) and § 241(6) are unconstitutional, and this Court should enjoin their continuing enforcement.

STATEMENT OF FACTS

Businesses for a Better New York ("BBNY"), a partnership of Western New York construction companies, insurance brokers, and individual contractors, has commenced this action against the New York State government officials¹ responsible for enforcing Labor Law § 240(1) and § 241(6), in order to have the Statutes declared unconstitutional. See, Plaintiffs Complaint. For years prior to the filing of this complaint, individual members of BBNY lobbied the New York State Legislature to have the Statutes repealed, because their continued enforcement has resulted in an astronomical increase in insurance premiums for construction companies that engage in height-related risk. Although

¹ Defendants include the Attorney General, Commissioner of Labor, the Superintendent of Insurance, and the Chairman of the Worker's Compensation Board. See Plaintiffs Complaint, 10-6-06.

significant changes to these laws have been proposed, plaintiffs' lobbying efforts have been unsuccessful to date. Thus, BBNY was created, and BBNY filed this suit on October 6, 2006.

A. History of the Statutes

New York enacted the first scaffold law in 1885. Called "The Act For the Protection of Life and Limb," the law made it a misdemeanor, punishable by a \$500 fine or six months in a county jail, to "knowingly or negligently furnish or erect unsuitable and improper scaffolding, hoists, stays, ladders, or other mechanical contrivances as will not give proper protection to the life and limb of any person" employed in the "erection, repairing, altering or painting of any house, building or other structure." 1885 Laws of New York, Chapter 314 §1. The ambit of the law included only those persons "employing or directing another to do or perform" labor in the construction business. 1885 Laws of New York, Chapter 314 §1. Over the years, this law has been amended many times. In 1897, the element of negligence was removed from the law, as was the criminal penalty. Instead, the law imposed absolute liability for its violation. 1885 Laws of New York Chapter 314 §1. The law was again amended in 1921 to require additional devices for the protection of laborers subject to elevation-related risks. 1921 Laws of New York Chapter 50 Article 10 § 240(1). An amendment in 1930 included demolition activities under the protection of the law. 1921 Laws of New York Chapter 603 § 240(1).

Beginning in 1962, New York courts, relying on the express language of Labor Law § 241(6), began to require actual direction or control by the owner or contractor as a prerequisite to the imposition of liability. 1962 Laws of New York Chapter 450 § 2. In 1969, the Legislature checked this attempted judicial reform and amended the Statutes to ensure absolute liability on owners and contractors. As New York's Court of Appeals has stated:

In calling a halt to its earlier backtracking, the Legislature minced no words. Referring expressly to both Section 240 and Section 241, its stated purpose in drafting these statutes was to fix “ultimate responsibility for safety practices . . . where such responsibility actually belongs, on the owner and general contractor.”

Hames v. New York Telephone Company, 46 N.Y.2d 132, 136 (1978).

The last significant amendment to Labor Law § 240(1) occurred in 1980 when homeowners of single and two-family houses were exempted from liability for contractors they hire to build their houses. 1980 Laws of New York, Chapter 670 § 240(1) (“owners of one and two family dwellings who contract for but do not direct or control the work”). This amendment arose in response to the seminal case, Allen v. Cloutier Construction Corp., in which a married couple was found strictly liable for the death of a plumbing subcontractor killed while working at their home when a trench caved in and collapsed upon him. 44 N.Y.2d 290 (1978). In its notes to the 1980 amendment, the Law Revision Commission noted, “The Commission believes that . . . the rule of strict liability has a salutary effect in promoting responsibility among those engaged in the business of construction and repair.” 1980 Recommendations of the Law Review Commission, Labor Law 240(1) (1980)

B. The Labor Law Statutes Today

Labor Law § 240(1) now provides, in pertinent part:

§ 240. Scaffolding and other devices for use of employees.

1. All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, or repairing, altering, painting, cleaning, or pointing of a building or a structure shall furnish or erect,

or cause to be furnished or erected for the performance of such labor, scaffolding, hoist, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

2006 Laws of New York, Chapter § 240(1).

Labor Law § 241(6) now provides, in pertinent part:

§ 241. Construction, excavation and demolition work.

* * *

6. All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provision of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.

2006 Laws of New York, Chapter § 241(6).

The Statutes, in conjunction with Labor Law § 200, govern the safety practices for work performed at construction sites in New York, particularly for work that involves height-related risks. The Statutes impose vicarious liability on owners and contractors for almost every workplace injury, allowing a plaintiff's own negligence to offset damages only in instances when that plaintiff is determined to be the sole proximate cause of his own injuries. See Black v. Neighborhood Housing Services of New York, 1 N.Y.3d 280, 771 N.Y.S.2d 484 (2003). As a result of the virtual strict liability standard imposed on owners and contractors by the Statutes, their liability for height-related workplace accidents and injuries is enormous. This potential

exposure greatly increases insurance rates, which has a dramatic impact on the viability of the business regularly conducted by BBNY's individual members.

C. Challenge Before the Court

After several years of unsuccessful lobbying, Frank DeCarlo of Paragon Restoration and Jeff Valone of Try-Lock Roofing, in conjunction with other area businesses, formed BBNY to challenge the constitutionality and continued enforcement of the Statutes. Frank and Jeff are typical of BBNY's members. They have family businesses that have operated in Western New York for several generations, but escalating insurance premiums have forced them to lay off workers. The increasing premiums have even threatened the continued existence of their businesses. They have watched countless similar businesses fail because of the insurance crisis caused by the continued enforcement of these laws.

BBNY's complaint advances three arguments: (1) that these statutes violate the Equal Protection Clause of the United States Constitution; (2) that these statutes violate the Commerce Clause of the United States Constitution; and (3) that the federal Occupational Safety and Health Act has preempted the statutes. See Plaintiffs' Complaint at 3. The Equal Protection and Commerce Clause violations stem from the fact that construction businesses working in New York State and facing height-related risks are paying measurably higher premiums for the same insurance coverage afforded to similar businesses without such risks.² New York cannot prove that these Statutes are required for the protection of workers, because the incidents of height-

² State of New York Insurance Department. Market Analysis and Regulatory Services and Casualty Actuarial Unit. "Contractors Liability Insurance Market Data Call Analysis and Statistical Agent Experience Analysis" 1/22/04

related accidents are not lower here than in other states without laws similar to the Statutes.³ In fact, New York is the only state in the nation that still has a statute that makes the owner or contractor absolutely liable for virtually every height-related injury. The last other state to have such a statute, Illinois, repealed its own statute in 1995 because of its ineffectiveness. The Supremacy Clause violation exists because the OSH Act, enacted in 1972, preempts the Statutes.

Defendants have now moved to dismiss BBNY's complaint. For the reasons stated in this brief, this Court should deny that motion in its entirety.

³ See United States Department of Labor, Bureau of Labor Statistics, 2003, 2004, 2005: North American Industry Classification System (NAICS): Construction Industry, Sector 23 – by state.

ARGUMENT

POINT I:

PLAINTIFFS' CLAIMS ARE LEGALLY SUFFICIENT.

The Second Circuit has provided the standard of review to be utilized by the Court in considering this motion to dismiss:

A Rule 12(b)(6) motion requires the court to determine if the plaintiff has stated a legally sufficient claim. A motion to dismiss under Rule 12(b)(6) may be granted only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); Branum v. Clark, 927 F.2d 698,705 (2d Cir.1991). The court's function is "not to assay the weight of the evidence which might be offered in support" of the complaint, but "merely to assess the legal feasibility" of the complaint. Geisler v. Petrocelli, 616 F.2d 636, 639 (2d Cir.1980). In evaluating whether plaintiff may ultimately prevail, the court must take the facts alleged in the complaint as true and draw all reasonable inferences in favor of the plaintiff. See Jackson Nat'l Life Ins. Co. v. Merrill Lynch & Co., 32 F.3d 697, 699-700 (2d Cir.1994).

In re September 11 Property Damage and Business Loss Litigation, 2006 WL 62019, at *40 (S.D.N.Y. October 17, 2006).

Plaintiffs' burden to overcome this 12(b)(6) motion is relatively low, and plaintiffs have easily satisfied their burden by both the Complaint and these opposition papers. Plaintiffs have clearly asserted legally cognizable arguments against the constitutionality of the Statutes, and though not exhaustive, Plaintiffs' evidence is sufficient to support those arguments. This Court should deny Defendants' motion to dismiss.

POINT II:

**THE LABOR LAW STATUTES VIOLATE
THE EQUAL PROTECTION CLAUSE**

Defendants argue that BBNY has not stated a viable Equal Protection Claim, because the complaint merely alleges that businesses in New York are treated differently than businesses in other states. This argument presents a simplistic and narrow view of the protection that the Equal Protection Clause provides to citizens. Further, this view misses a more subtle point: that the Statutes violate the Equal Protection Clause because they result in treating one class of citizens -- those who engage in height-related construction work -- differently than other similarly-situated citizens -- those who engage in construction work without substantial height-related risks. In their brief, defendants concede that the Equal Protection Clause “requires that State actors treat similarly situated people alike.” Defendants Memorandum of Law at 3, citing Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985). In many instances, the construction industry “citizens” are performing identical construction work. However, construction businesses that perform their work at ground level are not subject to the higher insurance premiums. This disparate treatment of similarly situated citizens gives rise to BBNY’s claim that the Labor Law violates the Equal Protection Clause.⁴

The Western District of New York most recently addressed an Equal Protection claim in Flaherty v. Giambra, 446 F. Supp. 2d 153 (WDNY 2006). In Flaherty, Judge Elfvin utilized a “rational basis” level of scrutiny to evaluate the Equal Protection claim. Flaherty,

⁴ To the extent that BBNY’s complaint does not articulate this or any subsequent claim clearly enough, we request that this Court grant BBNY leave to amend its complaint in order to more precisely state the claim, rather than to dismiss the complaint.

